

US 101/SR 109 Grays Harbor/Jefferson/Cllallam - Remove Fish Barriers

RFP Questions and Answers #3

Date: 11/05/2020

Question #	RFP Reference	Question	Date Received	Response
1	1.1 (A)	Would you consider amending the definition of "Culvert Bundle Longstop Date" by increasing "90 Calendar Days" to "180 Calendar Days" which is market standard?	10/22/2020	This will be addressed in an upcoming addendum.
2	1.1 (A)	Would you consider amending the definition of "Expiration Date" to mean the "Final Acceptance Date"? In accordance with industry standards, construction contracts expire upon final acceptance with certain obligations surviving expiry; see also question re: Section 3.2 (7).	10/22/2020	No, this section will not be revised.
3	3.2 (7)	Would you consider amending this Section to correct the numbering to Section 10.4 (Project Warranties Not Exclusive) and add Sections 10.2 (Warranty Work) and 10.3 (Landscaping Warranties) to the list of provisions surviving expiration or termination of the PDB Contract. Design-Builder would rather have the warranty provisions survive expiration or termination of the PDB Contract than extend the Term to the end of the Warranty Period.	10/22/2020	No, this section will not be revised.
4	3.2 (9)	The limitation on Design-Builder's liability set forth in Section 12.3 should survive the termination or expiration of the PDB Contract. Would you consider amending Section 3.2 (9) as follows: "Article 12 (Breach, Default, Remedies and Termination), as applicable to the rights and obligations of the parties following the Termination Date."?	10/22/2020	This will be addressed in an upcoming addendum.
5	4.2 (B)	Would you consider amending the last sentence as follows: "Following the issuance of a Notice to Proceed with Phase 2 Work, the Design-Builder shall be solely responsible for undertaking and completing the applicable Phase 2 Work in accordance with the Contract Documents, including supervision, coordination and administration of all Design Professional Services, and all other work reasonably inferable from the Contract Documents. "?	10/22/2020	This will be addressed in an upcoming addendum.
6	4.8 (A)	Would you consider amending the third sentence as follows: "Whenever it is so provided in this PDB Contract, the decision of the WSDOT Engineer shall be final; provided, however, that if an action is brought within the time allowed in this PDB Contract challenging the WSDOT Engineer's decision, that decision will be subject to the scope of judicial review provided in such cases under State law Article 11 (Dispute Resolution) of this PDB Contract."?	10/22/2020	This will be addressed in an upcoming addendum.
7	6.2 (G)	Would you consider amending the first sentence as follows: "Title to the Structures, improvements, fixtures, machinery, equipment and materials constituting the Project shall pass to WSDOT upon incorporation in the Project or payment therefor by WSDOT, whichever first occurs, free and clear of all Encumbrances as provided in subsection (H) (Encumbrances) of this Section."?	10/22/2020	No, this section will not be revised.
8	6.5 (G)	In addition to assuming generator liability, would you consider adding the following sentence at the end of this Section: "WSDOT will indemnify, defend and hold harmless the Design-Builder Indemnitees from and against (and pay the full amount of) any and all Loss and Expense that any Design-Builder Indemnitee may sustain in connection with the presence or removal of any Hazardous Material required by the Contract Documents or pre-existing Hazardous Material."	10/22/2020	No, this section will not be revised.
9	7.1	As previously stated, in accordance with industry standards, construction contracts expire upon final acceptance with certain obligations surviving expiry. Would you consider striking the last sentence: "The Design-Builder acknowledges and agrees that the performance of the Phase 2 Work, including the Warranty Work, under this PDB Contract is not complete until the expiration of the applicable Warranty Period."?	10/22/2020	No, this section will not be revised.

10	7.8 (B) (1), (2) and (3)	<p>A delay may not result in termination of this PDB Contract. Would you consider clarifying these Sections as follows:</p> <p>“(1) Culvert Bundle Substantial Completion. The amount of daily delay liquidated damages specified in the applicable Culvert Bundle Amendment for each day that the Culvert Bundle Substantial Completion Date falls after the applicable Scheduled Culvert Bundle Substantial Completion Date for the Culvert Bundle until and including the earliest of (i) the actual Culvert Bundle Substantial Completion or (ii) Termination Date;</p> <p>(2) Culvert Bundle Physical Completion. The amount of daily delay liquidated damages specified in the applicable Culvert Bundle Amendment for each day that the Culvert Bundle Physical Completion Date falls after the applicable date specified in subsection 7.5(A) (Culvert Bundle Physical Completion Requirements) for the Culvert Bundle until and including the earliest of (i) the actual Culvert Bundle Physical Completion or (ii) Termination Date; and</p> <p>(3) Culvert Bundle Completion: The amount of daily delay liquidated damages specified in the applicable Culvert Bundle Amendment for each day that the Culvert Bundle Completion Date falls after the applicable date specified in subsection 7.6(A) (Culvert Bundle Completion Requirements) for the Culvert Bundle until and including the earliest of (i) the actual Culvert Bundle Completion or (ii) Termination Date.”?</p>	10/22/2020	This will be addressed in an upcoming addendum.
11	8.1 (C)	Would you consider lowering the Key Personnel Liquidated Damages amounts?	10/22/2020	No, this section will not be revised.
12	9.3 (H)	Design-Builder’s preference is to provide a Retainage Bond. Would you consider amending the sentence starting on line 34 as follows: “WSDOT may also, at its Design-Builder’s option, accept a Retainage Bond in lieu of retainage, [...]”?	10/22/2020	This will be addressed in an upcoming addendum.
13	11	Section 11.1 addresses Dispute Resolution Procedures for Phase 2 Work only. However, these Dispute Resolution Procedures apply to Phase 1 Services as well (see Section 9.1 (E) for example). Would you consider clarifying that Article 11 applies to Phase 1 Services as well as Phase 2 Work?	10/22/2020	This will be addressed in an upcoming addendum.
14	12.2 (A) (1), (2), (3) and (4)	Would you consider moving these Events of Default by the Design-Builder to Section 12.2 (B) so that they require previous notice and cure opportunity? 12.2 (A) (1) could be subject to a 10-day cure period. 12.2 (A) (2) and (3) could be subject to a cure period similar to the Longstop Date. 12.2 (A) (4) could be promptly cured upon notice.	10/22/2020	This will be addressed in an upcoming addendum.
15	12.3 (B)	Would you consider lowering the Liquidated Damages Sublimit to 10% of the Culvert Bundle Guaranteed Maximum Price.	10/22/2020	This will be addressed in an upcoming addendum.
16	12.4 (3), (4) and (8)	<p>Would you consider amending these Sections as follows:</p> <p>“(3) Any fines or penalties levied or imposed by any Governmental Body to the extent caused by due to the acts or omissions of the Design-Builder;</p> <p>(4) Any claims, losses or penalties incurred by the Design-Builder to third parties in any Legal Proceedings to the extent they which arise from or are based on negligent, reckless, or intentional actions or omissions of any Design-Builder Person contrary to the requirements of this PDB Contract, from any breach of contract action in connection with third party contracts, or from any other dispute relating to this PDB Contract that results in a Legal Proceeding;</p> <p>(8) Any claims, losses, penalties or settlement payments paid to WSDOT in connection with any tort claim by WSDOT against the Design-Builder to the extent based on gross negligence, willful misconduct, fraud, misrepresentation or false claims.”?</p>	10/22/2020	This will be addressed in an upcoming addendum.

17	12.5 (A)	<p>Would you consider amending this Section as follows: “The failure, refusal or other default by WSDOT in its duty to pay any undisputed amount required to be paid to the Design-Builder under this PDB Contract within 30¹⁸⁰ Calendar Days following the due date for such payment shall constitute an Event of Default by WSDOT upon which the Design-Builder, by notice to WSDOT, may terminate this PDB Contract, subject to the terms and conditions of this Section.</p> <p>Notwithstanding anything to the contrary in this PDB Contract, if the failure, refusal or other default by WSDOT in its duty to pay any undisputed amount required to be paid to the Design-Builder under this PDB Contract persists for 60 Calendar Days following the due date for such payment, Design-Builder shall have the right suspend its performance of the Phase 1 Services of Phase 2 Work, as applicable.</p> <p>It shall also be an Event of Default by WSDOT upon which the Design-Builder may terminate this PDB Contract by notice to WSDOT and subject to WSDOT’s cure rights if WSDOT commits a material breach of this PDB Contract or otherwise fails to perform any other material obligation under this PDB Contract (unless such failure is excused by an Uncontrollable Circumstance as and to the extent provided herein).”?</p>	10/22/2020	No, this section will not be revised.
18	12.5 (B) (2)	If WSDOT is in default, Design-Builder should have the right to terminate regardless of WSDOT’s challenge. Would you consider striking this Section?	10/22/2020	No, this section will not be revised.
19	12.6 (F)	Would you consider shortening the payment terms for amounts due as a result of Convenience Termination to 60 days?	10/22/2020	No, this section will not be revised.
20	12.6 (F)	Would you consider increasing duration for convenience termination claim from 90 Calendar Days to 120 Calendar Days?	10/29/2020	This will be addressed in an upcoming addendum.
20	15.1 (A)	Would you consider amending the introductory paragraph as follows: “Subject to subsection (B) (Exceptions to and limitations on the Design-Builder Indemnity), the Design-Builder shall indemnify, defend and hold harmless the WSDOT Indemnitees from and against (and pay the full amount of) any and all Loss and Expense that any WSDOT Indemnitee may sustain in connection with any third party claims, Legal Proceedings, damages, losses, liabilities, response costs, costs and expenses, including any injury to or death of Persons or damage to or loss of property (including damage to Utility facilities), and including attorneys’ and expert witness fees and costs, to the extent arising out of, relating to or resulting from, or alleged to result from or in connection with) any:”?	10/22/2020	This will be addressed in an upcoming addendum.
21	17.12	Would you consider making this Section mutual so that Design-Builder’s officers are not personally liable?	10/22/2020	This will be addressed in an upcoming addendum.
22	App 6 Attachment 6C-3	<p>Would you consider the following changes to this paragraph as follows: “In the event the cost for completing Culvert Bundle Work described in any particular Schedule of Values line item exceeds the Schedule of Values dollar amount listed for such line item, the Design-Builder shall have the right to first receive compensation for such excess amounts from any remaining balance in the GMP as a whole prior to utilizing the Culvert Bundle Design-Builder Contingency. Whenever the Design-Builder exceeds the cost in a Schedule of values line item or utilizes the Culvert Bundle Design-Builder Contingency, it shall promptly provide the WSDOT Contract Representative with a narrative explanation of the amount and reason for the excess to be used from the balance of the GMP or payment against the Culvert Bundle Design-Builder Contingency.”?</p> <p>Our question. DBIA guidance implies that the GMP should be exhausted prior to the use of the Contingency for a particular GPM package as a whole, not by line item. This section of the contract currently stipulates that if a line item runs over the Schedule of Values amount, compensation can only come from the Contingency not the balance of the GPM. Was this WSDOT’s intention?</p>	10/22/2020	This will be addressed in an upcoming addendum.

23	5.10 (I)	If Design-Builder's relationship with WSDOT is terminate pursuant to this Section and Design-Builder causes its lead design Subcontractor to continue to perform, Design-Builder should not have any further design-related liability. Would you consider striking "or causes its lead design Subcontractor to continue to perform" on lines 6 and 7 of p. 92?	10/22/2020	This will be addressed in an upcoming addendum.
24	1.1 (A)	Would you consider amending the definition of "Uncontrollable Circumstances" to add "pandemics" after "epidemics" in number (8)?	10/22/2020	This will be addressed in an upcoming addendum.
25	4.10 (A)	Would you consider amending the last sentence of this Section as follows: "In the event of any termination of this Design-Build Contract in accordance with Article 12 (Breach, Default, Remedies and Termination), the Design-Builder shall remain fully responsible and liable for all negligent errors or omissions of any nature in completed, stamped Design Documents or RFC Documents as said negligent errors or omissions exist at the time of termination, or as otherwise negotiated and agreed to in writing by the parties in connection with such termination."?	10/22/2020	This will be addressed in an upcoming addendum.
26	6.7 (B)	Would you consider amending the last sentence of this Section as follows: "The Design-Builder shall indemnify, defend and hold harmless the WSDOT Indemnitees from and against all Loss and Expense resulting from any negligent errors, omissions, inconsistencies or other negligent design defects related to the Project."?	10/22/2020	No, this section will not be revised.
27	6.10 (B)	Would you consider amending the last sentence of this Section as follows: "If the Design-Builder disagrees with the suggested price, schedule or performance relief, if any, set out in the Unilateral Change Directive, the Design-Builder shall promptly notify the WSDOT Engineer and further respond in writing within 14 Calendar Days after receipt of the Unilateral Change Directive in accordance with Section 11.1 (Dispute Resolution Procedures) documenting its position and submitting the supporting information required to be provided by such subsection. Failure of the Design-Builder to notify the WSDOT Engineer within 14 ^{seven} Calendar Days after receipt of the Unilateral Change Directive or to provide written documentation of the Design-Builder's position within the time prescribed in this subsection shall constitute an abandonment of all entitlement to any relief under this PDB Contract and waiver by the Design-Builder of any further right to object to the Unilateral Change Directive. Any agreement by WSDOT and the Design-Builder to any price, performance or schedule relief pursuant to this Section and any related change in the terms and conditions of the Contract Documents, will be set forth in a Change Order. During the pendency of any protest or dispute resolution process hereunder, the Design-Builder shall proceed with the performance of the Phase 2 Work in accordance with the Unilateral Change Directive and shall keep and present, in such form as WSDOT may request, an itemized accounting to go with the appropriate supporting data with respect to the Design-Builder's position, including all information necessary to support Cost Substantiation. Design-Builder shall be entitled to monthly Progress Payments for work performed under a Unilateral Change Directive based upon Monthly Payment Support Documentation submitted. "?	10/22/2020	This will be addressed in an upcoming addendum.
28	A5E-1	Would you please clarify if Section 2 – Requests to Subcontract of Attachment 5E – Subcontracting is also intended to apply to Subcontractors who have worked on Phase 1 Services?	10/22/2020	Yes, the Request for Sublet requirements do apply to all subcontractors performing Phase 2 Work.
29	Transaction Form C	Will Design-Builder have an opportunity to review Transaction Form C – Form of Culvert Bundle Amendment prior to execution of the PDB Contract?	10/22/2020	Yes, the template form will be provided prior to execution of the PDB Contract.
30	ITP 2.4, PDB Contract 5.8 (A)	Schedule - The ITP anticipates executing the Project Implementation Agreement prior to completing all NEPA decisions and prior to completing all 30% designs. The PDB Contract states that WSDOT expects to request the Project Implementation Submittal concurrently with the completion of the 30% design for all of the Culvert Bundles. These two referenced clauses seem to be in conflict. Does WSDOT intend to proceed with Phase 2 implementation prior to the completion of 30% designs for all culvert sites?	10/27/2020	This will be addressed in an upcoming addendum.
31	PDB Contract 4.1 (B), A6-6.5	Fee negotiation-Appendix 6, Clause 6.5 state that the Design-Builder fee percentage...may be negotiated further by WSDOT. Clause 4.1 (B) (and elsewhere) states that the fee shall not be renegotiated. Does WSDOT intend to renegotiate the Design-Builder fee percentage?	10/27/2020	This will be addressed in an upcoming addendum.

32	PDB Contract 4.3 (B), ITP section 2.5	NEPA decision document-The PDB contract states that the Design-Builder must not prepare the NEPA/SEPA Document. The ITP states that the Design-Builder may prepare the NEPA decision document. Will the Design-Builder be permitted to prepare the NEPA decision document?	10/27/2020	This will be addressed in an upcoming addendum.
33	PDB Contract 8.4, etc.	The contract has numerous references to competitive bidding and a preference for subcontracting Phase 2 work. For example: "WSDOT may require work proposed as self-performed to instead be subject to a competitive procurement process." "All subcontracts shall be procured by the Design-Builder on a competitive basis..." "WSDOT may reject bids and re-solicit any Culvert Bundle Work..." ITP: "WSDOT reserves the right to require any and all Phase 2 work related to the Project to be openly and competitively procured by the Design-Builder." In our experience on previous contracts with negotiated GMP work, it can be difficult to obtain sufficient interest in the subcontractor community to achieve fair and reasonable pricing. This Project is made more difficult for prospective subcontractors by a PDB Contract that contains a new, unfamiliar and lengthy set of General Conditions (537 pages, versus 204 pages on the similar Chico Creek project and 155 pages in Chapter 1 of the Standard Specifications (without Traffic Control)). WSDOT could help achieve a fair price if some of these referenced clauses were softened to allow more "captive" subcontractors, allow for T&M subcontracts, allow the Design-Builder to publicly compete for the subcontract packages without counting such packages against the 40% self-permed limit and consider design-build proposals from interested subcontractors.	10/27/2020	No, this section will not be revised.
34	Proposal Form 10	Proposal Form 10 states that "The Proposer shall attach a narrative that includes...expected reimbursable expenses..." Is WSDOT expecting such reimbursable expenses to include items that would otherwise be included General Conditions cost in Phase 2?	10/27/2020	No, these are reimbursable expenses for Phase 1.
35	Proposal Form 10	Proposal Form 10 states that "The Proposer shall attach a narrative that includes... Such information, including in particular the fully loaded hourly rates, will be subject to review and diligence by WSDOT, based on standard WSDOT practices." What are the "standard WSDOT practices" referenced?	10/27/2020	This will be addressed in an upcoming addendum.
36	We are concerned with the following clauses that generally transfer uncontrollable risk to the Design-Builder:			
	4.5 (A)	WSDOT makes no representation or warranty with respect to any information provided to the Design-Builder by or on behalf of WSDOT in connection with this PDB Contract except as specifically provided in subsection (B) (Reliance by Design-Builder on the Reliance Documents) of this Section.	10/27/2020	No, this section will not be revised.
	4.6 (D)	Tribal approvals, laws and taxes (not defined by WSDOT) It is the Design-Builder's responsibility to contact the person or office listed in this subsection to determine whether any tribal laws or taxes apply to the Project.	10/27/2020	This will be addressed in an upcoming addendum.
	5.10 (G)	neither WSDOT nor the Design-Builder has any obligation whatsoever to negotiate with the other party to enter into any Culvert Bundle Amendment	10/27/2020	This will be addressed in an upcoming addendum.
	6.6 (B) (9) (5) (b)	Indemnify, defend and hold harmless the WSDOT Indemnitees from and against all Loss and Expense resulting from any Project Work-related liability incurred under the Governmental Approval.	10/27/2020	This will be addressed in an upcoming addendum.
	7.8 (B) (3)	WSDOT will determine the amount of delay liquidated damages for unexcused delay in achieving Culvert Bundle Substantial Completion, Culvert Bundle Physical Completion and Culvert Bundle Completion that are applicable to each Culvert Bundle at the time of entering into each Culvert Bundle Amendment.	10/27/2020	This will be addressed in an upcoming addendum.
	8.3 (I)	Subcontractor Claims. The Design-Builder shall, at the WSDOT Engineer's request, furnish satisfactory evidence that all obligations of the nature designated above in this Section have been paid, discharged or waived. (Whether or not WSDOT has paid the Design-Builder)	10/27/2020	This will be addressed in an upcoming addendum.

	10.1.(B)	The Project Warranties set forth in this Article shall, with regard to each Culvert Bundle, be in full force and effect for the period of time commencing on the Culvert Bundle Physical Completion Date for the Culvert Bundle and, subject to subsection 10.2(D) (Extension of Project Warranties), continuing for three years following such Culvert Bundle Physical Completion Date. (1 year is typical).	10/27/2020	This will be addressed in an upcoming addendum.
	12.4 (5)	Any defense or indemnity obligation owed by the Design-Builder to a WSDOT Indemnatee pursuant to Article 15 (Indemnification); (Tribal economic loss could be substantial)	10/27/2020	No, this section will not be revised.
	9.9	No right to stop work for late payment, just interest.	10/27/2020	No, this section will not be revised.
		No order of precedence	10/27/2020	No, this section will not be revised.
		Securing approval from the Tribes	10/27/2020	No, this section will not be revised.